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In The

Supreme Court of the United States

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONER

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BRIEF OF THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 513 F. 2d 1280.

The opinions of the United States District Court of the District of Nebraska are not reported as yet but are contained in Petition for Certiorari App. II, page 58 and page 73.

The jurisdiction of this court is invoked under the authority granted it to review by writ of certiorari to any civil case in the courts of appeals under 28 U. S. C.

§ 1254 (1). The judgments sought to be reviewed were entered by the United States Court of Appeals for the Eighth Circuit on January 28, 1975, petition for rehearing and suggestion for rehearing en banc was denied by said court on February 19, 1975, and the petition for certiorari was filed in this Court on March 27, 1975, within 90 days of the entry of the judgment sought to be reviewed as provided by 28 U. S. C. § 2101 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(3) 28 U. S. C. § 2254:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a

whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

(4) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(6) Neb. Rev. Stat. § 14-101 (Reissue 1974):

"All cities in this state which shall have attained a population of three hundred thousand inhabitants or more, shall be cities of the metropolitan class and governed by this act. Whenever the words this act occur in sections 14-101 to 14-138, 14-201 to 14-229, 14-360 to 14-376, 14-501 to 14-556, 14-601 to 14-620, 14-701 to 14-708, and 14-801 to 14-816, they shall be construed as referring exclusively to those sections. Each city of the metropolitan class shall be a body corporate and politic and shall have power (1) to sue and be sued, (2) to purchase, lease, lease with option to buy, acquire by gift or devise, and hold real and personal property within or without the limits of the city for the use of the city, and real estate sold for taxes, (3) to sell, exchange, lease, and convey any real or personal estate owned by the city, in such manner and upon such terms as may be to the best interests of the city; *Provided,* that real estate acquired for state armory sites shall be conveyed strictly in the manner provided in sections 18-1001 to 18-1006, (4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers, and (5) to exercise such other and further powers as may be conferred by law. The powers hereby granted shall be exercised by the mayor and council of such city, as hereinafter set forth, except when otherwise specially provided."

Neb. Rev. Stat. § 26-103 (Reissue 1964):

"No person shall be eligible to the office of judge of the municipal court unless he (1) is thirty years of age, (2) is a citizen of the United States, (3) is a resident of the state for at least three years next preceding his election or appointment, and (4) shall have been regularly admitted as an attorney in this state and remains as an attorney in good standing at the bar thereof."

(7) Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Supp. 1974):

29-3001. "A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

"A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."

29-3002. "An order sustaining or overruling a motion filed under the provisions of sections 29-3001

to 29-3004 shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided,* that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal."

29-3003. "The remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of sections 29-3001 to 29-3004 which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice."

29-3004. "The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004 and fix their compensation as provided in section 29-1803.03."

—o—

QUESTIONS PRESENTED FOR REVIEW

1. Should the suppression or exclusionary rule be modified to admit relevant, competent evidence obtained under the most exigent circumstances in the exercise of the utmost good faith by the police and courts where use of the rule could serve no deterrent effect or any other valid purpose?

2. Did not this court in *Michigan v. Tucker,* 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) modify the exclusionary rule in relation to the Fifth Amendment and by implication the Fourth (or if not, should it not),

when its invocation can only punish an innocent error and can have no deterrent or other useful purpose?

3. May it not be reasonable under extremely exigent conditions which portend further bombing, killing and civil disorder for police to enter a known hangout of a youth for whom the police have a valid arrest warrant for allegedly setting a booby trap bomb which killed a police officer, injured others and destroyed a house and at which time the police also have a warrant (later held invalid) to search said known hangout for explosives, when the police do not have probable cause to believe the youth is or is not there at the time of entry?

4. When police are in possession of sufficient facts to obtain a valid search warrant but fail to set forth enough in the affidavit or other evidence before the issuing magistrate, and the warrant issues anyway, may the deficiency be cured by additional probable cause evidence at the suppression hearing?

5. When the state courts find a search warrant valid and thus never consider the validity of the search without a warrant, although presented as an alternative in briefs on direct appeal to the State Supreme Court, shouldn't the Federal District Court send the issues of search without a warrant and probable cause to enter to execute an arrest warrant back to the state trial for exhaustion when said Federal Court finds the search warrant invalid in a Section 28 U. S. C. § 2254 proceeding?

6. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case where there is

no doubt of the guilt of respondent nor any societal interest to be served is a question properly cognizable under 28 U. S. C. § 2254?

STATEMENT OF THE CASE

This is a habeas corpus proceeding under 28 U. S. C. A. § 2254 commenced by respondent Rice in the United States District Court for the District of Nebraska against petitioner, Wolff, Warden, Nebraska Penal and Correctional Complex. The trial court, the Honorable Chief Judge Warren K. Urbom, ruled as follows:

1. That certain evidence admitted at the trial in the state court should have been suppressed for the reason that the affidavit for search warrant under which it was obtained was insufficient.

2. That said evidence should have been suppressed also because the circumstances of the case were not sufficient to authorize the search without a search warrant.

3. That the inspection of Rice's clothing after he was incarcerated was a product of the original illegal search and that evidence thereby obtained should have been suppressed.

The entire state court record was submitted to the Federal District Court by stipulation (see Petition of Certiorari, Appendix II, p. 59, l. 4), therefore, when references herein to Exhibits of state court records are made, it will not be possible to show the page where offered into evidence.

About 2:05 a.m., August 17, 1970, the radio dispatcher at the Omaha, Nebraska, Police Department received a call from a 911 operator indicating that a woman was screaming at 2865 Ohio Street, a vacant house (Pl. Ex. F-3, 193:1-6). He dispatched two patrol cars to said address. Another cruiser subsequently arrived (Pl. Ex. F-3, 211:11-20). The officers entered the house and began looking around. There was a suitcase lying flat in the doorway which blocked the entire doorway and the officers had to step over it to enter (Pl. Ex. F-3, 248:12-20). Officer Minard was directly over the suitcase and it exploded, killing Officer Minard and injuring Officer Tess and demolishing the house (Pl. Ex. F-3, 217:3-13; 241:11-19).

At the hearing on the motion to suppress (Pl. Ex. F-2), Sergeant Swanson testified that during a two year period prior to August 22, 1970, he built a file of newspapers supposedly published by the National Committee to Combat Fascism (Pl. Ex. F-2, 85:8), that a number of these articles bore the signature or the name of Edward Poindexter and David Rice, and a number of these articles were concerned with violence directed toward police officers (Pl. Ex. F-2, 86:1-8), and that defendant David Rice was a member of the N. C. C. F. or the Black Panthers (Pl. Ex. F-2, 88:13), and that he was aware of who the officers of the N. C. C. F. were from his files and periodicals (Pl. Ex. F-2, 89:10) and that in August of 1970 he knew the chairman of the N. C. C. F. was Edward Poindexter and that David Rice was the deputy minister of information (Pl. Ex. F-2, 89:19; 90:6-14). He further knew that Duane Peak was a member of the organization (Pl. Ex. F-2, 90:17).

By Saturday morning, August 22, 1970, a number of people had been interrogated and information from those interrogations began to focus on certain members of the N. C. C. F. (Pl. Ex. F-2, 92:23-93:10).

The voluminous police reports up to that time indicated that a number of witnesses had seen Duane Peak carrying a heavy suitcase on the night of the bombing and that he had warned others to keep away from the suitcase and it was generally identified as a suitcase similar to the one used in the bombing. Also, the voice of the person who called into the police station that a woman was screaming at the place of the bombing was identified as that of Duane Peak. The police reports, by stipulation, were admitted in evidence from the time of the bombing up to and including the night of August 22, 1970 (Pl. Ex. F-2, 182:1-183:9). These police reports are contained in plaintiff's Exhibit I.

On the afternoon of August 22, 1970, arrest warrants were issued for Edward Poindexter and Duane Peak. At about 4:00 or 5:00 p.m. that afternoon a task force of police officers was assembled and dispatched to make an arrest of the two. They first went to the N. C. C. F. headquarters where they made a search and arrested one Cecil and recovered a large amount of ammunition and firearms. The task force took Cecil and the material to police headquarters and then went back looking for Duane Peak and Poindexter, going to Poindexter's house at 3528 North 29th Street and the house of the parents of Frank and Will Peak and finally, being unable to find either Duane Peak or Poindexter, proceeded to the house of David Rice at 2816 Parker Street (Pl. Ex. F-2, 94:7;

95:1; 99:19; A. 35, 39, 42, 43). Prior to this the police had known that Peak had been at the Rice house (A. 44) at 2816 Parker Street. The house where Rice resided was more than a residence. There was a spoked hubcap hanging above the door and directly above that there was a black flag flying day and night; there was a green light burning at night, and in the windows there were posters of known Black Panther figures such as Huey Newton and so on (Pl. Ex. F-3, 208:17-209:5).

On various occasions numerous people stayed at the Rice house. Numerous people and community friends, when they didn't have a place to stay or if there was a party at the house and they didn't want to go home the next day, they stayed at Rice's house (Pl. Ex. F-2, 56: 15-22). Lt. Perry, who was in charge of the investigation, put the Rice house on the list as one of the places to search because he had information that Rice, Poindexter, and Duane Peak were constant companions and that Donald Peak indicated that his brother Duane told him that they were up there at the time they constructed the bomb (A. 74). Officer Pfeffer corroborates this to an extent when he states that they had information from Donald Peak that his brother was involved and also information from the intelligence squad that he had been seen with Rice and also had been in the area (A. 64) and that both Poindexter and Duane Peak frequented Rice's house (A. 26, 27). In addition, at the time the police went to Rice's house they had information that he had planted the bomb in question for the N. C. C. F. (A. 18).

When the task force had been organized that afternoon they were afraid there might be more bombings

and more deaths and that the N. C. C. F. would get to Duane Peak before the police and eliminate him (A. 51, 53). The police were concerned for Duane Peak's safety; they were concerned about protecting the public and themselves from other bombings and booby trap devices and, as a result, had been working nearly around the clock since the original bombing (A. 53, 72).

When they arrived at the Rice house there were lights on and a television set was playing inside the house. The officers knocked at the door and received no response. Officer Swanson and Officer Pfeffer then talked the matter over and decided they should throw a cordon of policemen around the house and the two of them should go and attempt to get a search warrant. They obtained a search warrant and returned in about an hour and proceeded very carefully through the house, looking for Duane Peak. The evidence which was obtained and suppressed by Judge Urbom, consisting of dynamite, dynamite caps, a 9-volt battery, wire pincers, et cetera, were all in plain sight in the house (A. 24, 54, 55).

The dynamite was found in a coalbin, what had previously been referred to as a cubbyhole, in the basement and is represented by defendant's Exhibit A, a photograph of the area, introduced in the federal court hearing (A. 29). The area was about six feet deep and the dynamite was in plain sight. Officer Swanson was familiar with this type of dynamite as it was the same as had been pre[redacted]nd in the past few months in Omaha (A. 28, 2[redacted] battery of the same type that was on the bo[redacted]nite caps, long-nosed pliers, and other

paraphernalia were also found in plain sight (A. 47, 56, 57).

Five days later, on August 27, 1970, David Rice turned himself in to the Omaha police. The usual procedure of taking and cataloging his clothes, giving him a shower and jail clothes was followed (Pl. Ex. F-2, 71:7-23). On the same date the clothing was sent to Washington, D. C. for analysis and dynamite particles were found in the cuffs of David Rice's clothes (Pl. Ex. F-2, 79:15-25).

The state district court and the Supreme Court of Nebraska both held the search warrant valid. *State v. Rice,* 188 Neb. 728, 199 N. W. 2d 480. Judge Urbom, in his memorandum and order of March 30, 1974, found it invalid. Although the issue of the validity of the search without a warrant was presented by both sides to the state Supreme Court, it was never necessary for the state courts to go into this issue.

Judge Urbom held it was not necessary to send the case back to state court to take additional testimony and pass upon the issue of the validity of the search without a warrant, after he found the warrant invalid, to meet exhaustion requirements (Memorandum, March 30, 1974, p. 9).

Other facts are contained in the argument where necessary.

———o———

SUMMARY OF THE ARGUMENT

1. The exclusionary rule is now primarily a rule of deterrence but its effectiveness in that regard is most questionable. This is especially true because the police and others cannot comprehend the complexity of search and seizure law, or when the police do violate the Fourth Amendment, they frequently are otherwise acting in good faith. Even if the goal of not offending the imperative of judicial integrity is still included in the exclusionary rule it should not be offended when the police are acting in good faith as above mentioned. The exclusionary rule applies to release the guilty in many cases but offers no remedy to the innocent and actually punishes society. The exclusionary rule therefore should be modified or abolished provided an alternative is supplied which will, in fact, deter the police departments, the governmental subdivisions which employ them and the individual policemen. Some alternatives suggested are that the exclusionary rule not be used except when there has been a substantial violation of the Fourth Amendment or in serious crimes where the Fourth Amendment violation is minute as compared to releasing a heinous criminal. Others have suggested fines of varying degrees against the employing agency, minimum judgments in tort actions, taking into consideration the proven policies and procedures of the particular police department including punitive damages in cases where willful or reckless disregard of individual rights are involved, discharge of the particular policeman involved, and graduated disciplinary actions against the policeman depending upon the nature of the violation and his prior record.

Finally, that meaningful alternatives can be designed which will not only deter the police better than the exclusionary rule but will avoid releasing the guilty defendant and provide a remedy for the innocent.

2. This court in *Michigan v. Tucker*, 471 U. S 433, abstained from applying the exclusionary rule in a Fifth Amendment context because all it could do would be to penalize a police error committed before the announcement of the exclusionary rule. While the present case occurred in a different time frame, the complexity of the search and seizure law and otherwise good faith of the Omaha police together with the fact that the evidence obtained under a Fourth Amendment violation is the same whether obtained legally or illegally, would justify the court in not applying the exclusionary rule in the present case.

3. Both lower federal courts determined that the police had to have probable cause to believe that Duane Peak, for whom the police had an arrest warrant was on the Rice premises at the time of entry before the police were authorized to seize the evidence which was in plain view. We contend that the test is reasonableness and that the police were acting reasonably when they went to a known hangout of Duane Peak's to execute the arrest warrant, were fearful that dynamite was in the community and that there may be further bombings, the lights in the house were on and the television set was playing, they knocked on the door and, in fact, did not disturb anyone since the premises were unoccupied, and did not enter the premises until they thought they were acting under a valid search warrant, constitutes reasonableness.

4. In the present case when the police left the scene to apply for a search warrant they were obviously in a hurry and did not use all of the material in the police department's possession in their affidavit to show probable cause. Nevertheless, a lawyer admitted to the bar of Nebraska who is also the police magistrate issued a search warrant. Later at the suppression hearing additional evidence was presented which it is contended was sufficient to validate the original affidavit. The Supreme Court of Nebraska discussing a number of U. S. Supreme Court cases held that it was proper to bolster the missing portions of the affidavit for a search warrant at the later suppression hearing because the United States Supreme Court has not resolved the controversy as to whether the police must always get a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient.

5. Since both the state trial court and the state Supreme Court found the affidavit for a search warrant was sufficient, the issue of search without a warrant was never gone into in the state courts although the issues were briefed and argued to the state Supreme Court.

Later the federal district court on habeas corpus found the affidavit invalid but ruled that it was not necessary to go back to the state court for exhaustion purposes but that any additional evidence necessary could be presented in the federal district court. The state contends that there has been no exhaustion and that the matter could be better handled at the state trial level where the state prosecutors and police are familiar with the evidence.

6. At common law and until 1969, collateral attack on violation of the Fourth Amendment grounds was not permitted in federal court convictions although such collateral review continued to rapidly increase as to state court convictions.

State courts normally provide at least a trial and direct review as well as a post conviction remedy. There should be a point at which finality of a conviction is reached, save in those cases where there is a valid claim of innocence or other important societal interest involved, for the protection of other values of our criminal law system. These include effective utilization of limited judicial resources and preservation of state-federal relations among others.

A meaningful alternative to the exclusionary rule can be designed which will deter police, compensate the victim and still permit valid evidence to be used; if such is devised, there will be no necessity for collateral review of state convictions in federal court for alleged search and seizure violations unless there is a valid claim of innocence or other important societal interest which all of us, of course, wish to protect.

ARGUMENT

1. The exclusionary rule should be modified in search and seizure cases.

A. Commentary.

It is clear from the citations by this court in search and seizure cases involving the exclusionary rule over the past four or five years that the court has read, cited and discussed most, if not all, of the arguments and law review articles attempting to analyze the pros and cons of the exclusionary rule. For this reason, we will attempt to avoid repetition as much as possible and do our best to make this brief, brief.

To start with, of course, this court is thoroughly familiar with the Honorable Chief Justice Burger's outstanding article as far back as 1964 when then Judge of the United States Court of Appeals for the District of Columbia, he wrote "Who Will Watch the Watchman," Vol. 14, the American University L. Rev. No. 1, p. 1. Similarly, the court is also thoroughly familiar, we are sure, with the Honorable Mr. Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999, and particularly the illogic exposed therein of the practice of inflicting the same penalty of excluding the evidence in all the various gradations of conduct by police from good faith down to the use of Gestapo-type tactics or in the belief that the police will suffer from suppression; the prosecutor may suffer—certainly society and the nation suffers, but rarely the individual policeman.

The court has also cited and undoubtedly has had quoted to it large portions of the excellent study by Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). As this court is well aware, this is one of the few discussions of the exclusionary rule which sets forth actual studies and statistics and attempts to draw some conclusions therefrom.

While the temptation is great to quote from various parts of this article of nearly one hundred pages, knowing the court's undoubted familiarity therewith, we will limit ourselves to a portion of the postscript which Mr. Oaks freely admits is based partially on his "own polemic on the rule". It is also arrived at from the actual factual material set forth in the article. A portion of this postscript concludes:

> "The exclusionary rule should be abolished, but not yet.
>
> "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.
>
> "The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with

> irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one. . . .
>
> ". . .
>
> "As to search and seizure violations, the exclusionary rule should be replaced by an effective tort remedy against the offending officer or his employer. Some of the law reforms necessary to make such a remedy effective were discussed earlier. A practical tort remedy would give courts an occasion to rule on the content of constitutional rights (the Canadian example shows how), and it would provide the real consequence needed to give credibility to the guarantee. . . . And it is time to abandon the irrational and costly procedure by which police behavior is reviewed only when the injured party is prosecuted, and the only compensation for injury effectively puts both guilty parties beyond the reach of the law."

Most discussions of the exclusionary rule imply, at least originally, that it is based upon an unwillingness to offend "the imperative of judicial integrity" or to deter illegal searches and seizures by police in the future or both. In the present case where the police officers had a valid arrest warrant for Duane Peak which they sought to execute by going to two of Duane Peak's known hangouts before arriving at the Rice premises (A. 14), which are the premises in question, and was also one of Peak's known hangouts, the police in good faith surely thought they had a right to enter this known hangout to execute the arrest warrant. However, undoubtedly because of their fear that they may not properly be interpreting the

law of search and seizure, took the time for two of the police officers to go to headquarters to prepare an affidavit (A. 9) for a search warrant of the Rice premises and present the same to a lawyer-magistrate (Neb. Rev. Stat. § 26-103 (Reissue 1964)) who issued a search warrant thereon (A. 10). Surely the police here cannot be charged with knowledge of unconstitutional acts as stated in the recent case of *United States v. Peltier,* issued June 25, 1975, — U. S. —, 95 S. Ct. 2313, where this court speaking on the retroactivity question stated:

> ". . . If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. . . ."

This court further stated in the same case at 2317:

> ". . . It would seem to follow *a fortiori* from the *Linkletter* and *Fuller* holdings that the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. . . ."

And likewise reaffirmed the language from *Michigan v. Tucker,* 417 U. S. 433, 447, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974), that:

> " 'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . .' "

The force of the above language clearly illustrates that the conduct of the police in the present case was not such that would offend the imperative of judicial integrity or could possibly deter future police behavior keeping in mind the complexity of the law of search and seizure itself. On the latter problem, the observations of Charles Alan Wright, Charles T. McCormick, Professor of Law at the University of Texas in 1972, even prior to many of the recent refinements of the law of search and seizure, noted:

> "There is a third reason why the Exclusionary Rule may not deter that seems to me even more forceful than the first two. A police officer *will not be deterred* from an illegal search *if he does not know* that it is illegal. The law of search and seizure is hopelessly complicated and confused. In a treatise on criminal procedure that I published in 1969 I devoted 145 pages to the subject, though I did not purport to deal exhaustively with it. In the first two years after that treatise appeared there had been so many important developments that I have an additional thirty-six pages on the subject in a supplement to the treatise. It defies reality to think that the average police officer could hold all of that arcane learning in his head or that he could always apply it correctly when he is required to make quick decisions in the course of the difficult and often dangerous business of law enforcement. . . ." (Emphasis added.)
>
> "Must the Criminal Go Free If the Constable Blunders?", 50 Texas L. Rev. 736, 740.

As the court is aware, *Michigan v. Tucker, supra,* involved the Fifth Amendment and as the court, of course, well knows, the case for limiting the exclusionary rule to "willful or at the very least negligent, conduct" is much

stronger for search and seizure cases inasmuch as the evidence obtained in violation of the Fourth Amendment search and seizure provisions is the identical evidence whether obtained legally or illegally whereas evidence obtained in violation of the Fifth Amendment may by reason of the very method used be tainted.

We really need not enter into whether the "judicial integrity" argument by supporters of the exclusionary rule continues to be one of the reasons for its existence; since even under that philosophy it should not be applied in this case. The argument seems to continue from the often quoted dissents of the Honorable Justices Holmes and Brandeis in *Olmstead v. United States,* 277 U. S. 438, at 469, 471, 72 L. Ed. 944, that the government should not "play an ignoble part," and that the evidence would be excluded "in order to preserve the judicial process from contamination." As mentioned before, "judicial integrity" is not offered when the officers, as in the present case, "reasonably believed in good faith that their conduct was in accordance with the law." *Linkletter v. Walker,* 381 U. S. 618, 14 L. Ed. 2d 882, 85 S. Ct. 1731; *United States v. Peltier, supra,* nor was such conduct "at the very least, negligent." *Michigan v. Tucker, supra.* Even if that could be said, it would be difficult to determine what was to be "deterred" in the future in the event such integrity is said to be offered or deterrence attempted from the conduct in this case, then the exclusionary rule clearly should be modified. On the other hand, in the area of rejecting reliable evidence through the exclusionary rule, especially in search and seizure questions, Wigmore and Cardozo, also have expressed strong opinions to the

harmfulness of the fact finding process that this has caused. In the now famous case of *People v. DeFore,* 242 N. Y. 13, then Judge Cardozo emphasized that under such a rule "the criminal is to go free because the constable has blundered." Similarly, Wigmore recognized that the exclusionary rules "serve neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal in their midst. . . ." Wigmore on Evidence, § 2184 (McNaughton Ed., 1961). As noted by the Honorable John J. Gibbons, Judge, U. S. Court of Appeals for the Third Circuit, the "expert opinions" of Justice, then Judge Cardozo and Wigmore, plus Chief Justice Weintraub's in opinions such as *State v. Bisaccia,* 58 N. J. 586: and *State v. Boykins,* 50 N. J. 73, "are entitled to great consideration." Gibbons' "Practical Prophylaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," Vol. 3, Seton Hall L. Rev. 295, 305.

At the present time, the argument in support of the exclusionary rule, as recognized by Professor Wright in 50 Tex. L. Rev. 736, at 738, mentioned above, is now in two parts. *First,* that there is no other effective remedy to enforce the Fourth Amendment and *second,* that the exclusionary rule deters the police from violating Fourth Amendment rights by making it profitless for them to seize evidence illegally.

From the mounds of material written adversely to the second proposition, it appears that it has not only had grave doubts cast upon it, but been nearly destroyed. Let us then take a look at the first proposition.

B. Alternatives or Modification to the exclusionary rule in search and seizure cases.

As suggested by the Honorable Mr. Chief Justice Burger, a number of states and Federal Congress have attempted to draft some form of tort liability as an alternative to the Exclusionary Rule. As mentioned in our petition for certiorari, Nebraska, in 1969 adopted a Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2401, et seq. (Reissue 1974) and the State Tort Claims Act, Neb. Rev. Stat. § 81-8209, et seq. (Reissue 1971), both waiving sovereign immunity in many cases. While these statutes are still undoubtedly deficient, there is no reason that we can see why they could not be drafted in such a way to give a real remedy to persons damaged by violation of the Fourth Amendment and to also actually deter unlawful police action. Many writers have also come up with suggested alternatives or modifications.

As pointed out by Professor Wright in 50 Texas L. Rev. 736 at 744, mentioned earlier, the facts of *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), were so drastic that drastic action was called for; on the other hand, from the facts of *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), in which a 14 year old girl was kidnapped and eight days later her frozen body was found at the side of the road, her throat slashed and she had been shot in the head, when the convicted slayer was released because the Attorney General who issued the search warrant had an interest in the case was more difficult for the man on the street to reconcile. In such cases as *Coolidge, supra,* he would apply a different rule because turning criminals of this kind free can only be justified by clear and convincing evidence that its benefit to society outweighs this obvious cost and the exclusionary rule falls far short of meeting that test. He then concludes:

> "I suggest that a line can be drawn, preserving the Exclusionary Rule for cases like the Mapp case while rejecting it for cases like the New Hampshire case. A solution of this kind has been proposed by the American Law Institute, a respected group of judges, lawyers, and professors, and is embodied in a bill introduced in the Senate by Senator Lloyd Bentsen of Texas. This would allow the courts to receive illegally-obtained evidence unless there has been a 'substantial' violation of the fourth amendment. The bill lists a number of factors that the courts would be required to consider in deciding whether the violation had been 'substantial' in a particular case, of which the most important would be the extent to which the police had deviated from what the fourth amendment permits, the extent to which their violation was willful, and the extent to which exclusion of the evidence would tend to prevent similar violations in the future. . . ."

The bill probably referred to by Professor Wright above is now contained in the ALI, a Model Code of Prearraignment Procedure approved May 20, 1975, §§ 290.2(3) and (4).

Carter LaPrade, of the New Haven, Connecticut Bar and formerly an assistant United States Attorney for the Southern District of New York and the District of Vermont, has suggested that an alternative means of enforcing the Fourth Amendment consists of the assessing of a fine against the employer governmental unit of the errant police officer after the sovereign, through its legislature,

had waived governmental immunity. He suggests a maximum assessed permissible fine to be in a meaningful amount varying with the nature of the particular sovereign from perhaps $50,000 against the federal government and lesser amounts against local authorities, depending upon their size. He further suggests that the amount to be awarded up to the maximum be based upon the seriousness of the Fourth Amendment violation citing both the ALI Model Code of Prearraignment Procedure and the Honorable Chief Justice Burger in *Bivens v. Six Unknown Federal Narcotics Agents, supra.*

In support of his argument that fines will deter, he concludes:

> ". . . Pity the sheriff, county D. A., or FBI Director appearing before a hostile legislative committee for next year's funding and explaining how, as a result of illegal searches, his office caused the forfeiture of X dollars of the taxpayer's money. Law enforcement officials clearly do not want scarce funds going into the pockets of criminal suspects as windfalls, a sentiment probably even more vehement among officers on the street than commanders up the line."
>
> "An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment" (1974) 48 Conn. Bar Journal 100, 109.

Of course, the present petitioner does not contend that the present case can be applied to other than state prosecutions.

A two-fold modification of the exclusionary rule is suggested in the Stanford Law Review, the first part of which is akin to the one mentioned above. That is that the exclusionary rule not apply in the most serious cases,

i. e. treason, espionage, murder, armed robbery, and kidnapping by organized groups. The exclusionary rule would be invoked in extreme police violations such as exemplified in *Rochin v. California,* 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205. The argument in favor of this modification is that the exclusionary rule would at least preclude exclusion of evidence where the police misconduct was far less serious than the crime sought to be proven. He suggests that a set of "core" rules, more specific than the *Rochin* test, could be developed, violations of which would lead to use of the exclusionary rule.

By limiting the exclusionary rule to lessor crimes it may be argued that police departments would actively encourage violation of the Fourth Amendment to solve them. If so, the author argues that the "core values" could be held to be violated and the exclusionary rule invoked. Furthermore, the nonuse of the exclusionary rule in serious cases could be supplemented by fines and court actions already discussed against top level police officers and possibly the officers involved; such a remedy would certainly do away with the public outcry against releasing serious criminals for relatively minor blunders on the part of the police. It would also, the author argues, give the departments and the courts more time to develop and interpret the Fourth Amendment as applied to less serious crimes where most of the motions to suppress occur.

The second portion of the modifications suggested by the Stanford article would stress more scrutiny, more affirmative action on the police departments themselves in developing standards, policies, etc. to see that the police are better informed and that the departments are striving

to follow the Fourth Amendment. Presumably, in actions against the department for damages or fines, the efforts and policies of the particular police department would be relevant to the court in determining the amount of damages or fine to be invoked. John Kaplan, Professor of Law, Stanford Law School, "The Limits of the Exclusionary Rule" Volume 26, Stan. L. Rev. 1027 at 1046, 1047, 1050 (May, 1974).

Another suggested remedy from California would be to enact a statute similar to the California Civil Rights Act, Cal. Civ. Code Sections 51 and 52 which guarantees equal rights in public accommodations and provides a minimum of damages of $250.00 for denial of equal rights in public accommodations. The writer suggests that for every such offense the employing governmental subdivision would be liable for actual damages suffered and suggests an addition of $300.00 thereto. He also advocates punitive damages to be awarded in cases where there is found to have been a willful or reckless disregard of an individual's rights. Also, in those cases where damages are awarded the aggrieved party should be entitled to recover reasonable attorney's fees and court costs. "The Decline of the Exclusionary Rule: An Alternative to Injustice" 4 Southwestern University L. Rev. 68, 80.

A similar remedy suggested providing collection of damages against a governmental unit and the officer, provided the trier of fact shall find the following:

> "Whether the officer violated the claimant's Fourth Amendment's rights; if the officer violated the claimant's Fourth Amendment rights, whether the violation was committed in an intentional, a reckless, or a grossly negligent manner."

The remedy then suggests that a minimum amount be prescribed by statute and any additional damages to compensate the claimant. It would further provide that if the trier of fact found that the violation was intentionally committed that the officer be discharged from government service; that if the act were committed in a reckless or grossly negligent manner that a penalty attached to the officer's salary in the amount and duration prescribed by statute; that each time said officer is found to have committed a Fourth Amendment violation either in a reckless or grossly negligent manner, the penalty shall increase according to a schedule prescribed by statute. The plan would also envision possible disciplinary action by the Civil Service Commission or other agency of the governmental subdivision and that no individual group, union or other representative of a government office shall indemnify the officer in whole or in part for any liability resulting under the plan. The plan would permit the officer to purchase liability insurance provided that no individual, group, union, etc. shall pay in whole or in part the premium or other charge for the insurance. "For Fourth Amendment Violations" Vol. 58, Judicature Number 2, August, 1974, pp. 75, 76.

Finally, the Honorable Justice Lynn D. Compton, Associate Justice, Court of Appeals, Second Appellate District of California, who served in the Los Angeles District Attorney's office for 19 years, the last four as Chief Deputy during which he was the prosecutor in the *Sirhan* case was appointed in 1970 as Chairman of the First California Conference on the Judiciary. As Chairman of the Honorary Committee Reviewing the Exclusionary Rule in the Third California Conference, he filed

a report to the Legislature entitled "The Exclusionary Rule: A Special Advisory Committee Report." After several pages of discussion the Committee concluded that the California Constitution should be amended providing for outright elimination of the exclusionary rule and providing a remedy to the innocent citizen who is offended by an unreasonable search and seizure characterized as an "Equal Rights Law". Similar to other plans outlined above, the Committee suggested the claimant be provided with two civil remedies, one against the public entity employer or, two, against the individual officer who violated the Fourth Amendment. One action would exclude the other. Should the claimant pursue his action against the employing agency, if he were successful, he would obtain a minimum of $250 plus attorney's fees and costs.

We respectfully submit that the primary purpose of the exclusionary rule as applied to state prosecutions is the deterrence of unlawful police action. That the objective of deterrence as to future police action cannot work or does not work when the law is too complicated for the police and many times the lawyer magistrates and other legal advisors to understand or when the police otherwise act in good faith. That the exclusionary rule if applied at all should only apply to cases where the defendant may show affirmatively that the police violated the Fourth Amendment intentionally or in bad faith.

That meaningful alternatives to the exclusionary rule can be devised which will not only deter the police and their employers from violating the Fourth Amendment but encourage them to adopt policies and procedures to prevent the same.

The time to end the experiment in our history when heinous criminals go free because of the operation of the exclusionary rule has come. There is practically unanimity in the segment of the law enforcement field which deals with these matters that the rule is not working; even the law review writers, generally law professors, whom one would normally expect to be on the other side of the issue, as illustrated in the commentary and suggestions, in general and for the most part agree that the exclusionary rule is not working and should be modified. It has had sufficient time to prove itself, and it has failed. While the past damage cannot be repaired, there is nothing to be gained by waiting any longer to effect the inevitable change which we all know must come for more realistic law enforcement as well as an equitable remedy for the innocent whose Fourth Amendment rights are violated.

2. Should not Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357, Prevent Exclusion of the evidence in this case?

The application of the exclusionary rule has recently been put in a more realistic context in the opinion of the majority of this court in *Michigan v. Tucker*. With regard to the concept of penalizing police errors through the sanction of the exclusion of evidence, the court stated:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must

consider whether the sanction serves a valid and useful purpose." (94 S. Ct. at 2365.)

Tucker involved the question of whether the testimony of a third-party witness, whose existence became known to the police only through the statements of a rape suspect who had concededly been improperly advised of his rights pursuant to the requirements of *Miranda v. Arizona,* 384 U. S. 436 (1966), should have been suppressed.[1] The court held that the testimony of the third party witness was properly admissible and not the "fruit of the poisonous tree."

Tucker then was decided in the context of the application of the Fifth Amendment; however, the opinion makes it clear that the same consideration espoused by the court in the paragraph from the opinion quoted above are equally applicable to Fourth Amendment issues, such as those which are presented in the instant case. Thus, the court, in *Tucker,* continued:

> "We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. We then continued:
>
> "'"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only

1 Actually Miranda had not been decided when the statements in question were obtained; however, since the interrogation took place pre-Miranda but the trial of the accused took place after the Miranda decision, Miranda was applicable to the case under the doctrine of Johnson v. New Jersey, 384 U. S. 719 (1966).

> effective available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217 [4 L. Ed. 2d 1669, 80 S. Ct. 1437] (1960).' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. (Footnote omitted.)
>
> "In a proper case this rationale would seem applicable to the Fifth Amendment context as well." (94 S. Ct. at 2365.)

There seems to be little doubt, then, that, in the eyes of the Supreme Court majority in *Tucker,* considerations of the validity of sanctions against the police in the form of exclusion of evidence apply equally to Fourth and Fifth Amendment questions.

Significantly, for the purposes of the issues presented in the instant case and for the arguments made in this brief, the court's opinion in *Tucker* stressed the fact that the concept of deterrence of improper police conduct, upon which the exclusionary rule is based, and the question of whether the police were acting in good faith are inextricably intertwined. The *Tucker* opinion continued:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (94 S. Ct. at 2365.)

This pronouncement lies at the heart of the instant case. We submit that it would be difficult to discover a

case in which the police were acting in *more* good faith or one in which the supposed deterrent against future "misconduct" would be *less*, should the decision of the lower court suppressing the evidence in this case be sustained.

There is even more reason for such abstention in a search and seizures case where there is no question as to the validity of the evidence seized as contrasted to the possibility of the confession being tainted in a Fifth Amendment case.

However, the United States Court of Appeals for the Eighth Circuit in the present case indicated in part III of its opinion that it was still bound by prior holdings of the United States Supreme Court rejecting a plea for an application of *Michigan v. Tucker* when it stated:

> "But the court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law."

It then proceeded to allude to some negligent conduct on the part of the Omaha police in conducting a widespread investigation in disregard of the constitutional rights of others, whereas in reality, the evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises (*Rice v. Wolff, Jr.*, No. 74-1682, Petition for Certiorari, Appendix 1, p. 55). The only place entered prior to going to the Rice premises was the NCCF headquarters.

3. Should not "reasonableness" under all the circumstances be the test for a search with a valid arrest warrant?

Both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Nebraska hold steadfastly to the proposition that before a search of premises under a valid arrest warrant may be had the police must have probable cause to believe that the person to be arrested is on the premises at the time (*Rice v. Wolff, Jr.*, Appendix 1, p. 51, Appendix 2, p. 81, Petition for Certiorari). As the court well knows, Article IV of the United States Constitution is divided into two clauses, the first relating to the right of the people to be secure against "unreasonable" searches and seizures and the second, that no warrants shall issue but upon probable cause.

We respectfully contend that the key word regulating searches and seizures is the word "unreasonable." We believe the lower courts have put undue stress in this case upon "probable cause" to believe the suspect is on the premises at the time of entry rather than upon whether or not the entry was "reasonable". The interests of the state and citizens of Omaha under the circumstances far outweighed the interests of the defendant. The Court of Appeals and the District Court both say *Warden v. Hayden*, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 is not applicable because the officers in *Hayden* had probable cause to believe the suspect was on the premises. We say this court upheld an officer with no warrant opening the lid of a washing machine to look for weapons (the machine was too small to hide the suspect) not be-

cause they had probable cause to believe the suspect was on the premises (although this goes to the reasonableness question), but because it was not unreasonable to open the lid of the washing machine under the circumstances. As this court there said:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape."

The same is true in the present case, except that in the present case the circumstances were even more exigent, the police had an arrest warrant and a search warrant, and the police opened the door of the premises rather than the door of the washing machine. Once they did so all of the evidence was in plain sight. The test of reasonableness has been met and a dogged adherence to a phrase that one must have "probable cause to believe the suspect is on the premises at the time" while it may be applicable to the second part of the Fourth Amendment concerning securing of a warrant or when time and danger are not factors, it should not be used to invalidate a "reasonable" entry, to exercise an arrest warrant which had already been secured upon "probable cause." The Court of Appeals (App. 1, p. 54, Petition for Certiorari) and the lower court used against the Omaha police the fact that they delayed the entry to obtain a search warrant saying this shows there was not exigent circumstances. Such reasoning not only punishes

the police for trying to comply with what they conceived the law to be in obtaining a warrant when possible, but also overlooks the fact that the lights in the house were on, the television was playing and the police who remained to guard the premises could see inside the house that there were many other units of the Omaha police following leads and working on the case around the city in the hopes of preventing further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance as the opinions indicate.

4. May additional facts be presented at the suppression hearing to bolster and validate the original affidavit for a search warrant?

In *Spinelli v. United States*, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, this court cited *Draper v. United States*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, as an appropriate example of probable cause. It there said:

> "The detail provided by the informant in Draper v. United States, 358 U. S. 307 (1959), provides a suitable bench mark."

The court went on to point out that the government informant did not state the way in which he had obtained his information but he did describe with minute particularity the clothes that Draper would be wearing, the train he would arrive on and other details. And, that independant police work corroborated much more than one small detail that had been provided by the informant. Upon meeting the Denver train on the second morning specified by the informer the police saw a man whose

dress corresponded precisely to the informant's description and since the report was of a sort which, in experience, may be recognized as having been obtained in a reliable way, the court stated that probable cause had been established.

In the present case at the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit because of the extreme volume of police reports and pressure of time. At the hearing on the motion to suppress adequate supplementary evidence known to the police at the time of the affidavit was presented sufficient to establish its authenticity as in *Draper, supra.* Furthermore, *Whitely v. Warden,* 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 indicates that the facts may be supplied later to support the previously issued arrest warrant. Neither the United States Court of Appeals for the Eighth Circuit nor the United States District Court for the District of Nebraska would adopt this approach, holding to the view that sufficient information must be presented to the magistrate at the time the warrant issues (See Appendix 1, p. 39 and Appendix 2, p. 68).

This court in *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, discussed the conflict or disagreement over the importance of requiring law enforcement officers to secure warrants pointing out that some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. But, that others have argued with equal force that a test of reasonableness, applied after the fact of the search or seizure when the police attempt to introduce the fruits in evidence affords ample safeguards for the rights in question so that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

In the present case two judges of the Supreme Court of Nebraska in a concurring opinion suggested that the affidavit for a search warrant should be validated by the evidence in possession of the police at the time of the search warrant but not included therein but which was later presented at the hearing for the motion to suppress. On February 6, 1975, the Supreme Court of Nebraska referred to this case *State v. Dussault,* 193 Neb. 122, — N. W. 2d — holding in a unanimous opinion as follows:

> "We discussed what we believe to be the import of Aguilar and Spinelli in State v. Rice, *supra,* and will not repeat it here. Moreover, we indicated in that case that the contents of the affidavit may, at a suppression hearing, be supplemented by other evidence known to the police and if in toto probable cause may be said to have existed at the time of the search, the motion to suppress shall be denied. We there cited Draper v. United States, *supra,* and Whiteley v. Warden, *supra,* as supporting the position we there took. We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit. See State v. Rice, *supra,* at p. 755, opinion

of McCown, J., concurring in result. Such a principle we deem proper in view of the fact that the United States Supreme Court has not resolved the controversy as to whether the police must always get a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient to protect constitutional rights. * * *'' (193 Neb. at 127).

This problem deserves the further attention of this court.

5. After the federal district court ruled the search warrant was invalid should not it have sent the case back to the state district court for the evidentiary hearing on the question of entry and search without a warrant for exhaustion of that issue?

Since both the state trial court and the state Supreme Court found that the search warrant was valid it had no occasion to ever go into the facts or the law as to whether the entry and search would have been valid without the warrant. This was never even presented to the state district court. While it was briefed and argued to the state Supreme Court it cannot be assumed that the state Supreme Court seriously considered the question since it was unnecessary to its finding.

Of more importance, had the federal district court sent the case back to the state trial court in Douglas County, Nebraska, the Douglas County Attorney and his staff who tried the case originally and who with the police department were much more familiar with the case than the Attorney General's Office, could undoubtedly have

developed the facts more thoroughly and convincingly than was done in the federal district court.

The stand of the United States Court of Appeals for the Eighth Circuit (Appendix 1, p. 46, Petition of Certiorari) here seems to be in direct conflict with the stand of the same court in *Goham v. Wolff*, 471 F. 2d 52, where the Supreme Court of Nebraska had determined that the retrocession of federal jurisdiction over Indian lands was invalid but made no determination as to pending cases even though the matter was briefed and argued to the state Supreme Court. When the case reached the United States District Court for the District of Nebraska the district court found the retrocession to be valid and remanded the case to the state Supreme Court for exhaustion of the state remedy as to pending cases. The state Supreme Court refused to act upon the matter and upon appeal to the United States Court of Appeals, it affirmed the United States District Court that there had been no exhaustion. We see no distinction from the present case and, in fact, in the present case there is much more need for exhaustion than in the *Goham* case.

6. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case where there is no doubt of the guilt of respondent nor any societal interest to be served is a question properly cognizable under 28 U. S. C. § 2254.

Before 1969, as this Court will well remember, most of the United States Courts of Appeals held that a federal conviction could not be collaterally attacked under

a 28 U. S. C. § 2255 proceeding on the grounds of an illegal search and seizure. In fact, many of us in positions in the various states responsible for attempting to uphold state court convictions, and particularly the State of Nebraska, in the United States Court of Appeals for the Eighth Circuit, argued that state court convictions were entitled to the same recognition and dignity as federal court convictions and that it followed that if search and seizure questions could not be attacked collaterally after a conviction in federal court, neither should they be allowed to be attacked collaterally in the federal court under 28 U. S. C. § 2254 after a state court conviction.

Before this argument had an opportunity to reach fruition, this Court, in 1969, in *Kaufman v. United States,* 394 U. S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068, took the opposite tack and held that allegations of s e a r c h and seizure after conviction in a federal court could be used in a collateral attack under 28 U. S. C. § 2255 case. However, there were three dissents in that decision. In one dissent the Honorable Mr. Justice Black declared:

> "It was formerly the rule in this country that judgments were so impervious to collateral attack that a defendant could not collaterally attack his conviction even after the Government had admitted his innocence. That rule, obviously a harsh and what might seem to most people an indefensible one, has of course now been abandoned. It was finally put to rest in Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). It is this element of probable or possible innocence that I think should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process. . . ." (394 U. S. 217 at 234)

The Honorable Mr. Justice Harlan and Mr. Justice Stewart also dissented in which they stated that they concurred with much of Mr. Justice Black's opinion but did not agree that the availability of habeas corpus must turn on petitioner's assertion that he was in fact innocent; they did agree that the availability of habeas corpus to contest illegal searches and seizures collaterally should be limited to special circumstances of the sort suggested in *Thornton v. United States,* 368 F. 2d 822. In *Thorton v. United States* the Court of Appeals for the District of Columbia stated in part:

> "The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary."

Even despite the above language, it is interesting to note that the State of Nebraska, which provides direct review of every criminal conviction, also adopted a post conviction procedure in 1965 which was reviewed in this Court in *Case v. Nebraska,* 381 U. S. 336, 14 L. Ed. 2d 422, 85 S. Ct. 1486. In that case the State of Nebraska passed a post conviction remedy pending the hearing in this Court on the question of whether or not a state must provide a collateral remedy for testing federal constitutional rights.

As pointed out by the Honorable Mr. Justice Brennan, concurring, the petitioner in *Case v. Nebraska* contended that substituting federal habeas corpus for state corrective process, as had been the policy prior to the enactment of the Nebraska post conviction procedure, was a disservice to sound principles of federalism, had put an intolerable strain on the federal writ and mounting friction between state and federal courts. In response to this the Honorable Mr. Justice Brennan stated:

> "The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well . . . ." (381 U. S. 336 at 344).

More recently, as this Court is also well aware, in *Schneckloth v. Bustamonte,* 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041, the Honorable Mr. Justice Blackmun, concurring, pointed out that he was a member of the Court of Appeals whose order was reversed by *Kaufman v. United States,* discussed above, that he was in agreement with nearly all that Mr. Justice Powell had to say in his concurring opinion in *Schneckloth.* Mr. Justice Powell, with whom Mr. Chief Justice Burger and Mr. Justice Rehnquist joined, concurring in *Schneckloth* at 412 U. S. 250, sets forth an excellent discussion of the place of habeas corpus under the common law, its development and where it should be today. We would not presume to even come close to improving upon the argument

there set forth. Instead, we would like to briefly emphasize a few of his excellent remarks. First, on the rare contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner's guilt:

> "Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful. That federal courts would actually redetermine constitutional claims bearing no relation to the prisoner's innocence with the possibility of releasing him from custody if the search is held unlawful not only defeats our societal interest in a rational legal system but serves no compensating ends of personal justice." (412 U. S. at 258).

On the costs in terms of serious intrusions on other societal values, not to further justice on behalf of arguably innocent persons but to serve mechanistic rules quite unrelated to justice in a particular case:

> ". . . Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimizaton of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." (412 U. S. at 259).

Mr. Justice Powell further emphasizes in *Schneckloth* that the exclusionary rule on collateral attack not only retains its major liabilities but its hoped for deterrent function is even more weakened coming months or years after the claimed intrusion.

The present case is a classic example of the reason why search and seizure questions should not properly be cognizable in federal habeas corpus. The main brief and the reply brief of David Rice on direct appeal in the Supreme Court of Nebraska are exhibits in the present case marked Plaintiff's Exhibits L1 and L2. Nowhere in said briefs is there any hint that Rice was innocent or that any interests of society were to be served by reversing the conviction or excluding evidence. Furthermore, Duane Peak, the person who actually planted the suitcase bomb and called in the 911 call to police headquarters, testified on behalf of the state concerning the making of the bomb by himself, David Rice, and Edward Poindexter at the home of David Rice (Pl. Ex. F4:425-444). We also call the Court's attention to the defendant's Exhibit N, Newsletters of the NCCF advocating violence to the police. All of the above evidence from the state court was admitted by stipulation. Finally, we call the attention of the Court to the federal petition for writ of habeas corpus (A. 4) in which neither innocence nor any other important issue to society is mentioned.

Professor Bator, in his article cited by Mr. Justice Powell in *Schneckloth*, points out that the problem of finality in criminal cases raises acute tensions in our society. But though society purports to bring citizens to the bar of judgment for condemnation for breaking the

laws'' . . . our instinct is that we must be sure before we proceed to the end, that we will not write an irrevocable *finis* on the page until we are somehow truly satisfied that justice has been done.'' (Bator, ''Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,'' 76 Harv. L. Rev. 441.) He points out that our society is particularly sensitized because of the abuses of power exercised through the legal process, through the age of dictators, etc. We could not agree more. However, we have devoted a long portion of this brief in Argument 1, as have many of the amicus briefs, to alternatives to the exclusionary rule in search and seizure cases. We sincerely and respectfully contend that this Court may, through the many alternatives suggested, design a remedy which will in fact deter violations of the Fourth Amendment in a much greater and more meaningful way than the use of the exclusionary rule and with that remedy available the person who has been convicted in state court through the use of evidence obtained by a violation of the Fourth Amendment will have no justification for collateral attack in the federal courts unless he has a valid claim of innocence or other justification of societal importance.

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CONCLUSION

For the reasons expressed in the foregoing arguments, petitioner respectfully prays that the judgment of

the United States Court of Appeals for the Eighth Circuit herein be reversed and the case remanded with instructions that a writ of habeas corpus not issue and the petition for writ of habeas corpus be dismissed.

Respectfully submitted,

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